IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M203 of 2018

BETWEEN

CONNECTIVE SERVICES PTY LTD (ACN 107 366 496)
First Appellant

CONNECTIVE OSN PTY LTD (ACN 106 761 326)
Second Appellant

AND

SLEA PTY LTD (ACN 106 752 434)
First Respondent

MINERVA FINANCIAL GROUP PTY LTD (ACN 124 171 759)
Second Respondent

MILLSAVE HOLDINGS PTY LTD (ACN 115 160 097)
Third Respondent

MARK SEAMUS HARON
Fourth Respondent

APPELLANTS' SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. Is the commencement and pursuit by the Appellants (collectively "**Connective**") of proceeding S CI 2016 001168 in the Supreme Court of Victoria ("**the Pre-emptive Rights Proceeding**") to enforce the pre-emptive rights provisions of their respective constitutions the giving of "financial assistance" within s 260A(1) of the *Corporations Act 2001* (Cth) ("**the Act**")?

3. Whether the Court of Appeal was correct to characterise the Pre-emptive Rights Proceeding as directed to the object of enabling the shareholders in Connective to acquire shares, rather than to the enforcement of existing rights of pre-emption in their respective constitutions?

4. Whether it was open to the Court of Appeal to characterise the Pre-emptive Rights Proceeding as materially prejudicing the interests of Connective, their shareholders or creditors?

PART III: SECTION 78B NOTICE

5. The Appellants consider that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: JUDGMENT BELOW

6. The Appellants appeal the decision of the Court of Appeal of the Supreme Court of Victoria in *Slea Pty Ltd & Anor v Connective Services Pty Ltd & Ors* [2018] VSCA 10 [**AB 79 – 104**].

PART V: FACTS

7. The Appellants were registered in 2003. Their constitutions contain materially identical terms. Clause 77 of each constitution [**AB 80**] contains pre-emptive rights in respect of the transfer of shares, requiring a member who wishes to transfer shares of a particular class to first offer those shares to existing holders of that class, in the proportion to the number of shares they hold.[1]

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[1] Clause 77 of each constitution provides:

> "77 **Pre-emption for existing Members on transfer of Shares**
>
> 77.1 Before transferring Shares of a particular class, a Member must offer them to the existing Shares of that class.
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> 77.2 As far as practicable, the number of Shares offered to each shareholder pursuant to clause 77.1 must be in proportion to the number of Shares of that class that they already hold.
>
> 77.3 To make the offer, the Member must give the Members a statement setting out the terms of the offer, including;
>
> (a) The number of Shares offered;
>
> (b) The price;
>
> (c) The period for which the offer will remain open;
>
> 77.4 If some of the Shares offered have not been fully accepted by the end of the period, the Member must re-offer the remaining Shares on the same terms to those members (if any) who accepted the offer in proportion to the number of Shares of that class that they are deemed to then hold by virtue of having already accepted some of the Shares on offer.
>
> 77.5 The Member appoints the Company its attorney in respect of any shares it is proposing to transfer to execute an instrument of transfer of shares in the name and on behalf of the Member.
>
> 77.6 The Member may transfer any Shares not taken up under the offers pursuant to cl 77.1 and 77.4 as they see fit provided that the terms, including price, are no more commercially attractive or advantageous to a third party than the terms of the original offer.

Clauses 78 and 79 of each constitution also provide:

> "78 **Registration of transfers**
>
> 78.1 A person transferring Shares remains the holder of the Shares until the transfer is registered and the name of the person to whom they are transferred is entered in the Registrar of Members in respect of the Shares.

8. At all relevant times during the events alleged in the Pre-emptive Rights Proceeding, the shareholders in Connective were the first respondent ("**Slea**") and the third respondent ("**Millsave**") [**AB 80**].[2] Slea's principal asset was the shares it held in Connective.

9. Without prior notice, pursuant to an agreement made on or about 18 May 2009 ("**the 2009 Agreement**"), Slea's director ("**Mr Tsialtas**") purported to to sell and transfer all of the shares held by him in Slea to the second respondent ("**Liberty**"). On or about 21 May 2009, Mr Tsialtas disclosed the existence of the 2009 Agreement to Connective. Shortly after, and following objections by Connective and Millsave, on 3 June 2009, Slea and Liberty terminated the 2009 Agreement [**AB 82**].

10. On or about 12 August 2010, Slea and Liberty entered into an agreement entitled the Accommodation Agreement ("**the Accommodation Agreement**"). The existence of the Accommodation Agreement was not disclosed by Slea until 14 December 2011 when it revealed it in a defence it filed in Supreme Court Proceeding S CI 2011 2114 between Haron, Millsave, Slea and Connective ("**the Haron Proceeding**") [**AB 82, ln 20-30**].

11. Connective commenced the Pre-emptive Rights Proceeding against the Respondents on 11 August 2016. In the Pre-emptive Rights Proceeding, Connective alleges that the Accommodation Agreement triggers the pre-emptive rights provisions of their respective constitutions and seek orders compelling Slea to comply with its obligations under the pre-emptive rights provisions [**AB 83, ln 20 – 84, ln 15**].

78.2 The Directors are not required to register a transfer of Shares in the Company unless:
(a) the transfer and the Certificate have been lodged at the Company's registered office; and
(b) any fee payable on registration of the transfer has been paid; and
(c) the Directors have been given any further information they reasonably require to establish the right of the person transferring the Shares to make the transfer.

79. **General discretion of Directors to refuse to register transfer**
Subject to the Act, the Directors may refuse to register a transfer of Shares in the Company for any reason."

See Ex JTV-2 to the affidavit of Justin Taede Vaatstra sworn 4 October 2016.

[2] From about October 2013, the shareholding in Connective altered so that the shareholders are Slea (as to 600 shares), Millsave (as to 900 shares) and the fourth respondent ("**Haron**") (as to 300 shares), but nothing turns on this alteration to the shareholding for the purposes of this appeal.

12. On 4 October 2016, Slea and Liberty applied for orders staying or dismissing the Pre-emptive Rights Proceeding, or alternatively for an injunction restraining Connective from seeking relief in the Pre-emptive Rights Proceeding. The application was brought on three grounds:
    (a) that the Pre-emptive Rights Proceeding had been instituted in breach of the *Harman* undertaking in relation to the Accommodation Agreement;
    (b) that instituting the proceeding was in breach of s 260A of the Act; and
    (c) that Connective did not have standing to enforce the pre-emptive rights or to seek the relief in the Pre-emptive Rights Proceeding [**AB 84, ln 19 - 25**].

13. The application was heard by Almond J on 8 December 2016, with judgment being delivered on 12 May 2017: [2017] VSC 182; [**AB 5 – 43**]. Almond J rejected the financial assistance ground and the standing ground, but upheld the *Harman* ground and stayed the Pre-emptive Rights Proceeding as an abuse of process [**AB 44**].

14. On 2 June 2017, the Appellants applied to lift the stay ordered by Almond J and for leave *nunc pro tunc* to use the Accommodation Agreement for the purpose of instituting the Pre-emptive Rights Proceeding. On 6 June 2017, Almond J ordered that any appeal or application for leave to appeal from the judgment of 12 May 2017 be filed within 14 days after the determination of the summons filed 2 June 2017 [**AB 85, ln 30**].

15. The Appellants' summons filed 2 June 2017 was heard before Judd J on 12 September 2017. On 22 November 2017, Judd J delivered judgment; granted the Appellants leave *nunc pro tunc* to use the Accommodation Agreement for the purpose of instituting the Pre-emptive Rights Proceeding; and lifted the stay ordered on 12 May 2017 [**AB 85, ln. 28 - 32**].

16. On 6 December 2017, Slea and Liberty applied for leave to appeal from that part of the decision of Almond J in which his Honour dismissed the financial assistance ground.

PART VI: ARGUMENT

A. SECTION 260A OF THE ACT AND ITS CONTEXT

17. The Pre-emptive Rights Proceeding is brought by Connective to enforce common form share pre-emption provisions in their constitutions. These pre-emption provisions are identical.

18. The Court of Appeal held that the conduct of Connective in commencing and pursuing the Pre-emptive Rights Proceeding, by reason that Connective is liable to pay for its own legal costs and potentially the legal costs of the Respondents (should it lose the Pre-emptive Rights Proceeding), is "financial assistance" within the meaning of s 260A(1) of the Act. The moneys which might constitute the said "financial assistance" are payable to lawyers, or the Courts, or the Respondents. They are not payable to, or on behalf of, any shareholders to enable them to buy shares in Connective.

19. The Appellants submit that the Court of Appeal took the wrong approach to the construction of s 260A(1) of the Act. The proper construction of s 260A(1) of the Act must commence with a consideration of its text. That text must be considered in its broader context, which permits examination of, amongst other things, the legislative history of s 260A, relevant extrinsic materials,[3] the mischief sought to be remedied by the provision,[4] and the purpose of the Act as a whole.[5] The Court of Appeal erred by failing to consider its broader context, with the result that the Court of Appeal's judgment effectively takes away a company's right to enforce the pre-emption provisions of its own constitution.

i) Legislative history of s 260A(1)

20. The prohibition on financial assistance, in Victoria first found in s 45 of the *Companies Act 1938* (Vic),[6] originated from the Report of the Company Laws Amendment Committee,

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[3] *FCT v Consolidated Media Holdings Ltd* [2012] 250 CLR 503 at [39] (French CJ, Hayne, Crennan, Bell & Gageler JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan & Kiefel JJ).

[4] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at p.408 (Brennan CJ, Dawson, Toohey & Gummow JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan & Kiefel JJ).

[5] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] (McHugh, Gummow, Kirby & Hayne JJ).

[6] Following on from the prohibition first contained in s 45 of the *Companies Act 1938* (Vic), section 67 of the *Companies Act 1961* (Vic) prohibited a company, "directly or indirectly" from giving financial assistance "for the purpose of, or in connection with" an acquisition "made or to be made" of its shares

1925-1926, Cmd 2657, in the United Kingdom. The prohibition was introduced as a result of the previously common practice of purchasing the shares of a company having a substantial cash balance or easily realisable assets and so arranging matters in a way that the purchase money was lent by the company to the shareholder on favourable terms.[7]

21. The immediate predecessor of s 260A of the Act was s 205 of the *Corporations Law*. It expressly prohibited "financial assistance" that was provided "directly or indirectly . . . for the purpose of or in connection with the acquisition of shares or units of shares". Section 205(1) of the *Corporations Law* provided:

> "Except as otherwise expressly provided by this Law, a company shall not:
> (a) Whether directly or indirectly, give any financial assistance for the purpose of, or in connection with:
> (i) the acquisition by any person, whether before, or at the same time as, the giving of financial assistance, of:
> (A) shares or units in the company; or
> (B) shares or units of shares in a holding company of the company; or
> (ii) the proposed acquisition by any person of:
> (A) shares or units in the company; or
> (B) shares or units of shares in a holding company of the company . . .[8]"

22. Further, s 205(2) of the *Corporations Law* contained an inclusive, non-exhaustive definition of what constituted financial assistance for the purposes of s 205(1). It said that a reference to the giving of financial assistance included a reference to the giving of financial assistance by means of making a loan, the giving of a guarantee, the provision of security, the release of an obligation or the forgiving of a debt or otherwise.

23. There has been uncertainty as to whether the prohibition on financial assistance in s 205 of the *Corporations Law* (and by extension to s 260A(1) of the Act) applied when there was a transfer of net wealth to the acquirer ("**the impoverishment theory**") or whether the

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[7] See *Re: VGM Holdings Ltd* [1942] Ch 235 at p.239 (Lord Reid M.R.)

[8] See also s 678(1) [public companies] and s 679(1) [private companies] of the *Companies Act 2006* (UK), which provides:

> "Where a person is acquiring or proposing to acquire shares in a [company], it is not lawful for that company, or a company that is a subsidiary of that company, to give financial assistance directly or indirectly for the purpose of the acquisition before or at the same time as the acquisition takes place."

And the predecessor to s 678(1) and s 679(1), which was s 151(1) of the *Companies Act 1985* (UK), which was expressed in identical terms.

prohibition caught, in a prophylactic way, any financial assistance which facilitated the acquisition of shares ("**the facilitation theory**"). The weight of authority in Australia favours the impoverishment theory, which has been applied to s 260A(1) of the Act.[9]

24. The origin of s 260A is to be found in the reforms aimed at simplifying the Corporations Law contained in the *Company Law Review Act 1998* (Cth).

25. Section 260A was introduced by the *Company Law Review Act 1998* (Cth) and is materially different in its terms from its predecessors in that it expressly permits financial assistance (and omits "whether directly or indirectly" and "for the purpose of, or in connection with") provided that the financial assistance does not materially prejudice the interests of the company, its shareholders, or creditors. The Explanatory Memorandum to the *Company Law Review Bill 1997* relevantly stated that the prohibition in s 205 of the *Corporations Law* "impede[d] many normal transactions."

26. The explanatory memorandum to the *Company Law Review Bill 1997* (Cth) states:

> "The Bill therefore prevents a company giving financial assistance to a person who acquires shares, or units of shares, in the company or a holding company if the transaction would materially prejudice the interests of the company or its shareholders, or materially prejudice the company's ability to pay its creditors (Bill, s 260A(i)(a)). This is subject to the exception that a company will be able to give financial assistance if the transaction has been approved by the company's shareholders in the manner set out in section 260B (Bill, s 260B (Bill, s 260A(i)(b)). This approach is intended to minimise the difficulties currently experienced for ordinary commercial transactions. In particular, for transactions which do not involve material prejudice, the new rules will make it unnecessary to decide whether the transaction involves the giving of financial assistance. The new rules will bring the requirements for financial assistance more closely into line with those proposed for capital reductions.[10]" (emphasis added).

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[9] See, for example, *Milburn v Pivot Ltd* (1997) 78 FCR 472 at pp.502E to 503G (Goldberg J) and the discussion of the authorities referred to therein. See also; *Independent Steels Pty Ltd v Ryan* [1990] VR 247 at p.254 (Fullagar J); *Sterileair Pty Ltd v Papallo* (1998) 29 ACSR 461 at p.466 (Heerey, Tamberlin & Hely JJ); *ASIC v Adler* [2002] 41 ACSR 72 at [341]-[349] (Santow J); *Adler v ASIC* [2003] 46 ACSR 504 at [359] (Giles JA); and *Kinnara Pty Ltd v On Q Group Ltd* [2008] 65 ACSR 438 at [27] (Robson J).

[10] Explanatory memorandum to the *Company Law Review Bill 1997* (Cth) Part 2J.3, [12.75].

27. Section 260A of the Act is in the following terms:

> "(1) A company may financially assist a person to acquire shares (or units of shares)[11] in the company or a holding company of the company only if:
>
> (a) giving the assistance does not materially prejudice:
>
> (i) the interests of the company or its shareholders; or
>
> (ii) the company's ability to pay its creditors; or
>
> (b) the assistance is approved by shareholders under section 260B (that section also requires advance notice to ASIC); or
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> (c) the assistance is exempted under section 260C.
>
> (2) Without limiting subsection (1), financial assistance may:
>
> (a) be given before or after the acquisition of shares (or units of shares); and
>
> (b) take the form of paying a dividend.
>
> (3) Subsection (1) extends to the acquisition of shares (or units of shares) by:
>
> (a) issue; or
>
> (b) transfer; or
>
> (c) any other means."

28. The textual differences in expression between s 205(1) of the *Corporations Law* and s 260A(1) of the Act are obvious. As is plain from the express words of s 260A, financial assistance is permitted if it does not materially prejudice the interests of the company or its shareholders; or the company's ability to pay its creditors. This appeal is only concerned with material prejudice to the former category.

29. In addition to permitting financial assistance, there has not been included anywhere in Part 2J.3 of the Act a definition of what constitutes financial assistance, which is unlike its predecessor in s 205(2) of the *Corporations Law* and comparable provisions in the United Kingdom.[12] Accordingly and, it is submitted, consistently with the purpose behind Part 2J.3 of the Act, theoretically any type of transaction, dealing, contract, arrangement or understanding which may fit within the meaning of "financial assistance" is permitted so long as it does not materially prejudicial to the interests of the company, its members or creditors.

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[11] By s. 9 of the Act "unit" is defined as a "right or interest, whether legal or equitable, in the share" and includes "an option to acquire such a right or interest in the share."

[12] See s 152(1) of the *Companies Act 1985* (UK) and s 677 of the *Companies Act 2006* (UK).

ii) Mischief or purpose s 260A(1) is directed towards

30. It is plain that the purpose or object of s 260A(1), as gleaned not only from the natural and ordinary meaning of the words used, but also from extrinsic materials[13] - such as the explanatory memorandum to the *Company Law Review Bill 1997* (Cth), *supra* - is to protect the interests of shareholders and creditors of a company from that company financially assisting a person to acquire shares in it, where that financial assistance materially prejudices the interests of the company, its members or creditors. Hence, to that end s 260A of the Act is remedial or beneficial to protect these interests.

31. Since the introduction of s 260A(1), a company can now provide financial assistance, whereas under its predecessors, it was prohibited from doing so and certain types of transactions were defined to come within the meaning of financial assistance, even though there may have been no actual recourse to the cash reserves or other assets of the company. These are significant changes.

32. The Appellants submit that while s 260A still achieves the remedial purpose of protecting shareholders and creditors, it also achieves a purpose beneficial to the company by allowing financial assistance to acquire shares in it where that does not materially prejudice the existing interests of shareholders and creditors. Section 260A(1) of the Act quite clearly seeks to balance these two objectives – as is plain from the explanatory memorandum to the *Company Law Review Bill 1997* (Cth).

iii) s 260A(1) within the context of the entire Corporations Act 2001 **(Cth)**

33. Section 260A(1) must also be construed harmoniously with the *Corporations Act* as a whole so as to avoid rendering other provisions otiose or coming into conflict with them.[14] The way in which the Court of Appeal held that s 260A(1) of the Act had been contravened, which appears at CA[75] to [78] [**AB 100, ln.22 to 101, ln.35**], places the operation of s 260A(1) of the Act in conflict with the rights conferred by other provisions of the Act,

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[13] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at p.408 (Brennan CJ, Dawson, Toohey & Gummow JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [79] (McHugh, Gummow, Kirby & Hayne JJ).

[14] *Ross v The Queen* (1979) 141 CLR 432 at p.440 (Gibbs J).

notably s 140 and ss 1072G and 1072F. That is unlikely to have been the legislative intent behind s 260A(1).

34. In the present case, the conduct of Connective that was held by the Court of Appeal at CA[76] to [77] [**AB 100, ln.33 to 101, ln.20**] to amount to financial assistance derived from two elements:
    (a) Connective's liability for legal costs of instituting and pursuing the Pre-emptive Rights Proceeding; and
    (b) Connective's potential liability for costs if it is unsuccessful in the Pre-emptive Rights Proceeding.

35. Further, which is common ground, the conduct complained of here is simply the institution of the Pre-emptive Rights Proceeding itself. No further facts are relied on by Slea or Liberty in asserting a breach of s 260A(1) [**AB 100, ln.22 to 32**].

36. The Court of Appeal concluded at CA[77] [**AB 100, ln.39 to 101, ln.23**] that this conduct amounted to financial assistance because:
    (a) Slea will not, unless ordered, abide by its obligation under the Connective constitutions and deliver the required notice under the pre-emption provisions;
    (b) if Slea is ordered to do so, Millsave and Haron will have the option of accepting the offer which is contained in the notice Slea is required to deliver;
    (c) it comes at a cost and/or there is a contingency that Connective will have to pay Slea's and Liberty's costs; and
    (d) Millsave and Haron do not have to bear the costs themselves.

37. By s 140(1) of the *Corporations Act*, the constitutions of Connective have the effect of a contract between Connective and each member, and between each member and each other member. The result of the Court of Appeal's judgment is that the pre-emptive provisions of a company's constitution cannot, *prima facie*, be enforced by the company because to do so would be to assist others to acquire shares, and that assistance has a dollar value equal to the cost of enforcing the right, thereby amounting to "financial assistance".

38. If allowed to stand, the Court of Appeal's judgment means that a company has no practical ability to enforce rights of pre-emption in its constitution, despite that s 260A(1) of the Act

does not contain clear express words abrogating such a right. The purpose of pre-emptive rights provisions in a company's constitution is plain – namely to prevent the sale of shares to strangers so long as other members of the company are willing to buy them at a price prescribed by the relevant provision. This is a perfectly legitimate restriction in a private company.[15] That a company has the right and standing to sue so as to compel compliance with the rights of pre-emption contained in its constitution is uncontroversial.[16] Further, a company has the right to sue to enforce rights of pre-emption in its constitution where separating out the interests in a share, such as the legal and equitable interests, are employed as an artifice to circumvent the pre-emptive right.[17]

39. The Act itself also recognises that there may be provisions of a company's constitution which are pre-emption provisions and which can be enforced by the company. This can be seen from a combination of several provisions, namely:
    (a) s 1072G, which authorises the directors of a proprietary company to refuse to register a transfer of shares in the company "for any reason"; and
    (b) s 1072F(2)(c), which provides that the directors of a proprietary company are not required to register a transfer of shares unless they have been given any further information they may reasonably require "to establish the right of the person transferring the shares to make the transfer".

40. A sufficient reason why the directors of a proprietary company might refuse to register a transfer is that the procedures in the company's constitution might not have been followed. In the present case, cl. 77.1 of the Connective constitutions makes it absolutely clear that compliance with the pre-emption provisions is a condition of the ability to transfer shares.[18]

41. On the Court of Appeal's view of the express words of s 260A(1), if the directors of a company refused to register a share transfer on the grounds that the transfer did not comply with the constitutional rights of pre-emption, proceedings commenced by the company seeking declarations that its directors had acted within power in refusing to register the

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[15] *Lyle & Scott Ltd v Scott's Trustees* [1959] AC 763 at pp.777-778 (Lord Reid); see also *Grant v. John Grant & Sons Pty Ltd* (1950) 82 CLR 1 at p.28-29 (Williams J).
[16] See *Lyle & Scott Ltd v Scott's Trustees* [1959] AC 763 at p.775 (Viscount Simonds) and p.781 (Lord Reid).
[17] Ibid at p.785 (Lord Reid).
[18] See also cll. 78 and 79, which are set out at fn.2, *supra*.

transfer - thereby requiring the transferor to comply with the rights of pre-emption in order to complete the transfer - would amount to a contravention of s 260A(1) of the Act.

42. It is plain from the foregoing, the effect of the Court of Appeal's judgment is to put s 260A(1) in conflict with s 140 and ss 1072F and 1072G where a company seeks to enforce rights of pre-emption in its constitution.

iv) The proper approach to the construction of s 260A(1)

43. Section 260B(3) of the Act contains a penal sanction making it an offence for any person involved in a contravention of s260A(1) if their involvement is dishonest. For this reason, the approach taken by Almond J to the proper construction of s 260A(1) of the Act is the better approach, namely that a Court should not strain the provision to cover conduct that does not fall squarely within it.[19] A similar approach had been taken to the predecessors to s 260A(1) of the Act.[20]

44. Further, by reason of the matters submitted in 17 to 42 above, it is submitted that the Court of Appeal erred by failing to consider the context in which s 260A(1) was enacted and that the legislative intent behind the new section was to alleviate the rigidity of its predecessor, s 205 of the *Corporations Law*, which caught ordinary commercial transactions.[21]

B. Financial Assistance

45. Another difference in expression between s 205 of the *Corporations Law* and s 260A(1) of the Act is that under s 205 a "company shall not . . . **give any financial assistance** for the purpose of, or in connection with . . . the acquisition of . . . shares", whereas under s 260A(1) "a company may **financially assist** a person to acquire shares . . . only if . . ." one of the circumstances in sub-paragraphs (a) to (c) apply.

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[19] See [2017] VSC 182 at [95] [**AB 38, ln.25 to 32**].

[20] See *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2006] EWCA Civ 456 at [26] to [27] (Toulson LJ); *Wambo Mining Corp Pty Ltd v Wall Street (Holding) Pty Ltd* [1998] 28 ACSR 654 at pp.667-669 (Sheller JA); *Tallglen Pty Ltd v Optus Communications Pty Ltd* (1998) 146 FLR 380 at p.385 (Young J); and *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1986] 1 BCLC 1 (Ch.D) at 10 (Hoffman J). The strength of previous decisions as a guide depends on matters such as the similarity of the language and context of the provisions, including their objects; see See *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at [31] (Gleeson CJ, Gummow, Hayne, Heydon & Crennan JJ); *Marshall v Director-General of Department of Transport (Qld)* (2001) 205 CLR 603 at [62] (McHugh J); and *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corp Ltd* (2007) 212 FLR 56 at [105] - [107] (Chernov JA).

[21] Ibid.

46. The Appellant's submit that there is no difference in the compound term "financial assistance"[22] as that appeared in s 205 and in "financially assist"[23] as that compound term appears in s 260A(1) of the Act.[24]

47. Though it is accepted that simply because the expression "financial assistance" has been previously interpreted in Australia and in the United Kingdom, and that these decisions may be of assistance, they do not control or govern the proper construction of the expression "financially assist" or "financial assistance" as used in s 260A.[25] The strength of previous decisions as a guide depends on matters such as the similarity of the language and context of the provisions, including their objects.[26]

48. Insofar as the expression "financial assistance" or "financially assist" appears in s 260A, it is plain that previous decisions have considered precisely the same expression in the context of a provision (namely, s 205 of the *Corporations Law*, s 67 of the *Companies Act (Vic)* 1961, s 129 of the *Companies (NSW) Code*, and s 151(1) of the *Companies Act 1985* (UK)) which had the object of protecting the interests of members and creditors of a company by ensuring that a company's resources were not diminished to assist a purchaser in acquiring shares in that company. Further, by the adoption of the expression "financial assistance" in s 260A(2); s 260B(1) and (3), s 260C(1) to (5) and s 260D(1) of the Act, the expression "financially assist" and "financial assistance" are used interchangeably throughout Part 2J.3 of the Act.

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[22] The *Shorter Oxford English* Dictionary, sixth edition, vol.1, defines "Financial" as "of or pertaining to revenue or money matters". "Assistance" is defined as "the action of helping; help, aid, support". To like effect, the *Australian Oxford Dictionary*, eighth edition, defines "Financial" as "relating to finance; possessing money". "Finance" is defined as "the management of a large amount of money; monetary support for an enterprise. In its verb tense it is defined as "provide funding to a person or enterprise. "Assistance" is defined as "the action of helping someone by sharing work; the provision of money, resources or information to help someone." The ordinary and natural meaning of both "Financial" and "Assistance" overlap, and to attempt to construe this term by reference to the individual meaning of each word makes no linguistic sense.

[23] The *Shorter Oxford English* Dictionary, sixth edition, vol.1, defined "Financially" as the adverb of "Financial", *supra*. "Assist" is defined as "to give help or support". To like effect, the *Australian Oxford Dictionary*, eighth edition, defines "Financially" as "in a way that relates to finance". "Finance" is defined as "the management of a large amount of money; monetary support for an enterprise, and in its verb tense as to "provide funding to a person or enterprise. "Assist" is defined as "to help someone by doing as share of the work; help by providing money or information".

[24] It is to be noted that "financial assistance" is used in s 260A(2), s 260B(1) and (3), s 260C(1) to (5) and s 260D(1) of the Act.

[25] See *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at [31] (Gleeson CJ, Gummow, Hayne, Heydon & Crennan JJ); *Marshall v Director-General of Department of Transport (Qld)* (2001) 205 CLR 603 at [62] (McHugh J).

[26] See *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corp Ltd* (2007) 212 FLR 56 at [105] - [107] (Chernov JA).

49. It has long been held that the expression "financial assistance" – in the context of s 67 of the *Companies Act 1961* (Vic) and s 205 of the *Corporations Law*[27] - has no technical meaning and its frame of reference is in the language of ordinary commerce. Further, it has long been held that to determine whether there is "financial assistance" or something is being done to "financially assist" the Court must examine the interlocking elements of the whole transaction, consider the commercial realities of the transaction and decide whether it can properly be described as the giving of financial assistance.[28] This was the principle applied by Almond J, which was held by the Court of Appeal to be the correct principle to apply.[29]

50. According to the Court of Appeal, however, Almond J erred, first by putting too much weight on the potential penal consequences of a contravention of s 260A, and second, by considering that the absence of a "transaction" supported the conclusion that Connective was pursuing the action for its own purposes.

51. As to the first error suggested by the Court of Appeal, the Appellants refer to and repeat the submissions at [17] to [44] above and say that Almond J applied the correct approach to the proper interpretation of s 260A(1) of the Act.

52. As to the second error suggested by the Court of Appeal, there are difficulties with the Court of Appeal's view. They arise principally from its erroneous approach to the construction of s 260A(1).

53. First s. 260A(1) requires that the financial assistance be "given" by the company to a person.[30] In all but the very unusual case that will involve there being a transaction which has that effect. Of course, as Almond J noted at J[96] [**AB 38, ln.33 to 41**], the word "transaction" is not itself used in s 260A but, as his Honour said at J[96], in the absence of some transaction, it is difficult to see why, in starting proceedings to compel compliance

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[27] See also in the context of s 129 of the *Companies (NSW) Code;* for example in *Jury v Vogt* [1993] 10 ACSR 718, and s 151(1) of the *Companies Act 1985* (UK) for example *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2007] EWCA Civ 456.

[28] See *Charterhouse Investment Trust LTD v Tempest Diesels Ltd* [1986] BCLC 1 (Ch.D) at 10 (Hoffinan J); *Milburn v Pivot Ltd* (1997) 78 FCR 472 at p.501F (Goldberg J); *ASIC v Adler* [2002] 41 ACSR at 72 at [342] (Santow J); *Adler v ASIC* [2003] 46 ACSR 504 at [359] (Giles JA); *Kinnara Pty Ltd v On Q Group Ltd* [2008] 65 ACSR 438 at [26] (Robson J).

[29] See CA[79] [**AB 101, ln.35 to 43**].

[30] *Sterileair Pty Ltd v Papallo* (1998) 29 ACSR 461 at p.466 (Heerey, Tamberlin & Hely JJ).

with its own constitution a company is not pursuing the action for the company's purposes, rather than giving financial assistance to anyone. There was no evidence of any other conduct, transaction, contract, arrangement or understanding between the Appellants, Millsave and Haron which had the objective of leading to an acquisition of Slea's shares.

54. Second, in considering the impugned conduct as a whole, *including* the absence of a discrete transaction, his Honour correctly applied the test of "financial assistance" identified in *ASIC v Adler* [2002] 41 ACSR 72; *Adler v ASIC* [2003] 46 ACSR 504; and *Kinnara Pty Ltd v On Q Group Ltd* [2008] 65 ACSR 438. His Honour was correct to follow those decisions.[31]

55. Third, as found by Almond J at J[98] [**AB 39, ln.25 to 39**], the commercial realities of the transaction said by Slea and Liberty to infringe s 260A did not confer any benefit on Millsave and Haron. They had existing rights under cl. 77 of the constitutions and nothing more was being given to them by the institution and continuance of the proceedings.[32] Certainly, there was no provision to them of any part of the money consideration that they might have to pay to Slea (assuming the Pre-emptive Rights Proceeding is successful) in order to obtain Slea's shares.[33] Further, the relevant commercial realities were that absent the Pre-emptive Rights Proceeding Slea's position was as a shareholder having rights and duties provided for by the Connective constitutions, but who was asserting as against Connective, Millsave and Haron that it was entitled to disregard its duties by refusing to make the offer that it was bound to make.

56. Fourth, the Court of Appeal's approach to the application of the compound expression "financial assistance" in effect split up the words, ascribing a separate meaning to each, and simply placed a dollar value to the perceived assistance and equated that with "financial assistance" for the purpose of s 260A(1). That is not the proper approach to the construction of compound terms.[34]

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[31] See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135] (Gleeson CJ, Gummow, Callinan, Heydon & Crennan JJ); *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at p.492 (Mason CJ, Brennan, Dawson, Toohey & Gaudron JJ).

[32] *Woodroffe v Box* (1954) 92 CLR 245 at pp.254-257 (Fullgar & Kitto JJ); *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1 at p.29 (Williams J); *Carew-Reid v Public Trustee* (1996) 20 ACSR 443 at p.455 (Owen J).

[33] *Independent Steels Pty Ltd v Ryan* [1990] VR 247 at p.254 (Fullagar J); *Wambo Mining Corp Pty Ltd v Wall Street (Holding) Pty Ltd* [1998] 28 ACSR 654 at pp.667-669 (Sheller JA).

[34] *XYZ v Commonwealth* (2006) 227 CLR 532 at [19] (Gleeson CJ); [102] (Kirby J); and [176] (Hayne & Callinan JJ).

57. Lastly, and as submitted above at [33] to[42], on the views adopted by the Court of Appeal, if the directors of the Appellants had, exercising the rights conferred by ss 1072F and 1072G of the Act, refused to register a transfer of shares on the grounds of non-compliance with the pre-emptive provisions of cl. 77, proceedings commenced by the company seeking declarations that they had acted within power in refusing to register the transfer would be financial assistance within the meaning of s. 260A. That is too broad, and should be rejected.

C. NET TRANSFER OF VALUE (IMPOVERISHMENT)

58. The Court of Appeal at CA[60] and CA[77] [**AB 96 and 100**] correctly identified that there could only be financial assistance if there was a "net transfer of value" from the Appellants to Millsave and Haron to enable them to acquire, or acquire an option, in the shares.[35]

59. In reality, however, the only relevant transfer of value was from the Appellants to their lawyers for the provision of their services. To adopt what was said by Fullagar J in *Independent Steels Pty Ltd v Ryan* [1990] VR 247 at 254, there was no provision by the Appellants of any part of the money consideration that would be payable by Millsave and Haron to obtain Slea's shares.[36] As such, there was no net transfer of the Appellants' wealth to Millsave or Haron for the purchase of Slea's shares.

D. MATERIAL PREJUDICE

60. If it be accepted by the Court that there was "financial assistance", the Appellants accept they have the burden of proof on the question as to whether there was no material prejudice[37]. The Court of Appeal at CA[77] to [87] [**AB 100 to 103**] held that the Appellants had not shown that there was no material prejudice.

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[35] See *ASIC v Adler* [2002] 41 ACSR 72 at [344] (Santow J); *Adler v ASIC* [2003] 46 ACSR 504 at [359] (Giles JA); *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1986] 1 BCLC 1 (Ch.D) at p.10 (Hoffman J). The focus of s 260A is that financial assistance to acquire shares is permitted so long as the financial assistance does not materially prejudice the company. In *ASIC v Adler* [2002] 41 ACSR 72, Santow J at [344] said of s 260A that "*it opted for what might be called the "impoverishment" doctrine as against a more wide ranging prophylactic approach*"

[36] See also *Wambo Mining Corp Pty Ltd v Wall Street (Holding) Pty Ltd* [1998] 28 ACSR 654 at pp.667-669 (Sheller JA).

[37] "Material prejudice" means that the effect of the financial assistance is to provide for a net transfer of value from the company to the person acquiring the shares. That is, one looks to the interlocking elements giving rise to the financial assistance and then determines the financial consequences for the interests of the company or its shareholders in order to see where the net balance of financial advantage lies from the giving of the financial

61. The Court of Appeal erred and misdirected itself as to the question of material prejudice. Instituting a proceeding to enforce rights in the constitution of the company cannot materially prejudice the interests of the company or its shareholders – it can only enhance or protect their interests.[38]

E. "OBJECT" OF THE TRANSACTION, PURPOSE AND EFFECT

62. The object of the transaction is to be gleaned from looking at its commercial reality. The plain object of the institution of the proceeding was and is to ensure that the shareholders' rights were properly recognised and administered according to the Connective constitutions. The Court of Appeal erred in finding that the object of the institution of the proceeding was to provide assistance to Millsave and Haron by failing to look at the commercial reality of the conduct complained of, and assessing whether there was financial assistance provided "to" them for the acquisition of shares in accordance with approach in *ASIC v Adler* [2002] 41 ACSR 72; *Adler v ASIC* [2003] 46 ACSR 504; and *Kinnara Pty Ltd v On Q Group Ltd* [2008] 65 ACSR 438.[39]

63. At CA[85] [**AB 102**] the Court of Appeal appears to have taken the view that subjective purpose could not be taken into account, yet at CA[77] [**AB 100**], the Court of Appeal referred to the "purpose of the proceeding" and the outcome which the "proceeding seeks to procure". The Appellants submit that the Court of Appeal erred by failing to look at the commercial realities of the entirety of the relevant conduct to determine the "effect" of that conduct.

64. Further, in assessing the "effect" of the conduct, the Court of Appeal gave insufficient attention – see CA[77] [**AB 100**] – to the fact that the effect of instituting the Pre-emptive Rights Proceeding was not to create any new rights in, or confer any benefits on, Millsave and Haron.[40]

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assistance: *ASIC v Adler* [2002] 41 ACSR 72 at [349] (Santow J); *Kinnara Pty Ltd v On Q Group Ltd* [2008] 65 ACSR 438 at [27] (Robson J).

[38] See [38], *supra*.

[39] See also *Sterileair Pty Ltd v Papallo* (1998) 29 ACSR 461 at p.466 (Heerey, Tamberlin & Hely JJ); *Wambo Mining Corp Pty Ltd v Wall Street (Holding) Pty Ltd* [1998] 28 ACSR 654 at pp.667-669 (Sheller JA); and *Independent Steels Pty Ltd v Ryan* [1990] VR 247 at p.254 (Fullagar J).

[40] *Woodroffe v Box* (1954) 92 CLR 245 at pp. 254-257 (Fullagar & Kitto JJ); *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1 at p.29 (Williams J); *Carew-Reid v Public Trustee* (1996) 20 ACSR 443 at p.455 (Owen J).

PART VII: ORDERS SOUGHT

65. The Appellants seek the following orders:

(a) The Appeal be allowed with costs;

(b) Paragraphs 2, 3 and 5 of the orders of the Court of Appeal made 3 August 2018 be set aside and lieu thereof it be ordered that the Application for leave to Appeal to the Court of Appeal be refused with costs.

PART VIII: ESTIMATE OF TIME

66. The Appellants estimate that they will require 90 minutes for oral argument.

DATED: 1 February 2019

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